No. 97-8214

IN THE SUPREME COURT
OF THE UNITED STATES
October 1997 Term

ANGEL FRANCISCO BREARD,

Petitioner,

v.

FRED W. GREENE, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITIONER'S BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Imminent Execution Scheduled
April 14, 1998

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Petitioner Angel Francisco Breard responds as follows to the Brief of the United States as Amicus Curiae:

1. 28 U.S.C. § 2254(a) makes collateral relief available to state prisoners who are in custody in "violation of the Constitution or laws or treaties of the United States." The Court's authority to grant collateral relief to Breard springs from Section 2254(a), not from the Vienna Convention. Therefore, the alleged lack of a remedy within the treaty itself is irrelevant to Breard's case.

2. The reason that Breard's claim based on violation of the Vienna Convention was not raised in a timely fashion is that the Commonwealth of Virginia, which had the obligation to notify Breard of his right to consular notification, did not do so in a timely fashion. It is unseemly, if not unconscionable, to make Breard bear the consequence (in this case the forfeiture of his life) of the state's dilatoriness. Reduced to its essence, the United States says that a criminal defendant or habeas petitioner must present a claim based on a failure of consular notification *before* he has been made aware of the existence of his right to consular notification. Merely to state this proposition is to illustrate its illogic. However appropriate the United States' position may be for the small number of detainees who have independent knowledge of their rights under Article 36(1) and can assert them in a timely manner, that position is irrational and unreasonable for most foreign nationals because they are in no position to protest the failure of consular notification until the receiving state informs them that a right to notification exists in the first place. For detainees like Breard, who were never notified of their right to consular notification (or who were notified only after it was too late to raise a timely claim under state law), the common-law rule of procedural bar does not "enable full effect to be given to the purpose for which the rights accorded under [Article 36(1)] are intended."

The United States misses the mark when it cites this Court's application of its procedural default jurisprudence to habeas corpus claims based on alleged violations of the United States Constitution. Congress could, if it chose, enact legislation providing that federal constitutional claims cannot be procedurally barred in habeas proceedings. It has not done so. The Vienna Convention, however, contains an express shield against the operation of procedural default when that domestic law impairs full effect from being given to specific provisions within the treaty, including the right to consular notification. The shield was part of the treaty to which the Senate consented, that the President ratified, and that is now the law of the land.

3. Citing Smith v. Murray, 477. U.S. 527 (1986), the United States suggests that the unavailability of a legal claim does not provide cause for a procedural default unless the legal basis for the claim was impossible to discover. The better interpretation of the "unavailability" exception to procedural default is contained in Reed v. Ross, 468 U.S. 1 (1984), and Coleman v. Thompson, 501 U.S. 722. Those cases require only "reasonable unavailability," meaning that compliance with the state procedural rule was "impracticable." Id. at 753.

4. The United States' "new rule" argument is the same as that raised by the habeas respondent. Even the lower court's most ardent scholars of the "new rule" jurisprudence did not find this argument persuasive, and neither should this Court. A treaty which has been the law of the land for more than a quarter of a century, which has been routinely complied with by federal law enforcement officials, and which has mandated consular notification for all detained foreign nationals from signatory countries is simply not a "new rule."

The consular notification provision was unavailable to Breard because of its obscurity, not because of its actual novelty. It was buried in a small number of legal authorities that explained or analyzed diplomatic or immigration law. Breard had no diplomatic status, and his immigration problems, if any, were not the proper concern of the lawyers appointed to defend him on charges of capital murder.[1]

CONCLUSION

For the reasons stated above, Petitioner Angel Francisco Breard respectfully requests that his Application for a Stay of Execution be granted.

Respectfully submitted,

ANGEL FRANCISCO BREARD

By Counsel

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[1] If Breard's defense counsel had asked the state court for permission to incur the cost of researching diplomatic and immigration law, based on nothing more than speculative hope that they might find something to assist their client because he was a foreign national, there is no doubt that the state court would have denied the request.

CERTIFICATE

I certify that a copy of the foregoing was faxed and hand-delivered to Donald R. Curry, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, and faxed to Seth P. Waxman, Esquire, Solicitor General of the United States, Office of the Solicitor General, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001 on April ___, 1998.